FILE COPY

Nos. 424 and 425

In the
Supreme Court of the United States

October Term, 1944

No.....

KENNECOTT COPPER CORPORATION, a corporation, *Petitioner,*

vs.

STATE TAX COMMISSION; and J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL, and HEBER BENNION, JR., constituting said State Tax Commission, *Respondents.*

No.....

SILVER KING COALITION MINES COMPANY, a corporation, *Petitioner,*

vs.

STATE TAX COMMISSION; and J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL, and HEBER BENNION, JR., constituting said State Tax Commission, *Respondents.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that writs of certiorari be issued to review the respective judgments of the United States Circuit Court of Appeals for the Tenth Circuit entered July 23, 1945. (R. 169, 170).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit and the dissenting opinion of Judge Orie L. Phillipps will be found at pages 159 and 165 of the record; they are not reported as yet. The opinion of the United States District Court for the District of Utah, Central Division (R. 37) is reported in 60 F. Supp. 181.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 23, 1945 (R. 169, 170). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. [28 U.S.C.A. § 347(a)].

QUESTIONS PRESENTED

The questions presented are:

(1) Whether §§ 80-5-76 and 80-11-11, Utah Code Annotated 1943, authorizing the taxpayer to sue the State "in any court of competent jurisdiction" to recover an occupation tax paid under protest, waive the immunity of the State to suit in a Federal court.

(2) Whether a taxpayer who sues the State Tax Commission of Utah and the individuals comprising the Commission for the amount of an unlawful and wholly unauthorized tax paid under protest, thereby sues the State of Utah exclusively and deprives the Federal court of jurisdiction over any of the defendants, unless the State shall have waived its immunity to suit in a Federal court.

STATUTES INVOLVED

Section 80-5-66, Utah Code Ann. 1943, whereby an occupation tax is imposed on every person engaged in the business of mining or producing valuable metalliferous ore "equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold," an excise, levied upon the gross amount received from sales of ore or metals.

Section 80-5-81, Utah Code Ann. 1943, whereby it is provided that all such taxes shall be paid to the State Tax Commission.

Section 80-5-76, Utah Code Ann. 1943, whereby it is provided that "any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by § 80-11-11, Revised Statutes of Utah, 1933."

Section 80-11-11, supra, whereby it is provided that where a party, whose property is taxed, or from whom a tax is demanded or enforced, deems such tax unlawful, he may pay the same under protest to the officers designated and authorized by law to collect the same, and thereupon "may bring an action in any court of competent jurisdiction against the officer to whom said tax . . . was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax."

Section 80-11-13, Utah Code Annotataed 1943, whereby it is provided that taxes paid to the State under protest should not be covered into the general fund but should be held and retained by the State Treasurer and not be expended until it shall have been finally determined that such tax had been lawfully or unlawfully collected.

The pertinent portions of the several statutes referred to are set forth in the appendix, infra, pages I and II.

There is nothing in the Utah statutes indicating an intention on the part of the legislature that the phrase "any court of competent jurisdiction" should not embrace the Federal courts.

The Emergency Price Control Act of 1942, approved January 30, 1942 [56 Stat. 23, as amended October 2, 1942; 56 Stat. 767; 50 U. S. C. Appendix 901, 902(e)], the purpose of which among others was to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts as might be determined to be necessary to obtain maximum necessary production.

Executive Order No. 9250, Title V, as amended by Executive Order No. 9281 (50 U. S. C. Appendix, § 901, p. 316) pursuant to authority conferred by the Emergency Price Control Act of 1942 by which order Metals Reserve Company was authorized to subsidize, if such measure were necessary to insure the maximum production of any commodity necessary to the successful prosecution of the war.

The Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, ch. 199, Title III, § 201 (56 Stat. 177, 50 U. S. C. Appendix § 633, p. 258) whereby the President of the United States was authorized to allocate all production in such manner as he should deem necessary or appropriate in the public interest and to promote the national defense.

Executive Order No. 8734, April 11, 1941, as amended by Executive Order No. 8875, August 28, 1941 (Vol. 9, U. S. C. Cong. Serv. 1941, pp. 852, 867), whereby the Office of Price Administration was created and the administrator's duties were defined, among which duties was that of prescribing maximum prices and all elements of cost or price of materials or commodities and enforcing their observance; and pursuant to authority thus conferred upon it, the Office of Price Administration on August 12, 1941, established a ceiling price for copper of 12c per pound (Price Schedule No. 15, 6 Fed. Reg. 4008). And on January 13, 1942, the Administrator issued Price Schedule No. 69 (7 Fed. Reg. 284) which fixed the maximum price for primary lead at 6½c per pound. And on January 28, 1942, the Administrator issued Price Schedule No. 81 (7 Fed. Reg. 601) fixing the maximum price for primary slab zinc at 8¼c per pound.

Executive Order No. 9024 (Vol. 1, Cumulative Supplement, Code of Federal Register of U. S. A., p. 1070) issued January 16, 1942, whereby the President of the United States created the War Production Board, established a chairman, and among other things authorized and empowered him to exercise general direction over the war procurement and production program; and on February 9, 1942, in order to stimulate increased production for the war effort, the War Production Board and Office of Price Administration issued a joint statement (R. 107) providing for subsidies supplementary to the ceiling prices for these metals to be paid by Metals Reserve Company for production in excess of quotas fixed for the various producers. Metals Reserve Company did *not* thereby *agree to purchase* any ore (R. 75), but pursuant to the order has paid subsidies for production

in excess of quotas of 5c per pound for copper, 2¾c per pound for zinc, and 2¾c per pound for lead.

Article I, Sec. 8 of the Constitution of the United States, empowering Congress to declare war and prosecute the same; and Article I, Sec. 10 of the Constitution of the United States denying that power to the states.

Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no state shall deprive any person of property without due process of law.

STATEMENT

May 11, 1937, the State of Utah imposed on all persons engaged in the business of mining "an occupation tax equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore sold" during the calendar year then next preceding; the tax was an excise levied upon the gross amount received from *sales* of ore or metals. (§ 80-5-66, Utah Code Annotated 1943). The State Tax Commission was empowered to administer the Act.

During the year 1943 the National Government paid to petitioners and other mining companies similarly engaged subsidies to stimulate their production of metals critically essential to the prosecution of the war. In 1944 respondents exacted of petitioners one per cent of the subsidies so paid petitioners respectively, as for the occupation tax, and accordingly petitioner Kennecott Copper Corporation, a citizen of New York, and petitioner Silver King Coalition Mines Company, a citizen of Nevada, paid to the respondent State Tax Commission under protest $37,814.22 and $4533.54, respectively. Petitioners then instituted these suits against the

State Tax Commission and the individuals constituting the commission, in the United States District Court for the District of Utah, to recover the sums paid. The two suits were consolidated for purpose of trial, were briefed and argued together in the United States Circuit Court of Appeals, and were so treated in the opinion of the Circuit Court of Appeals.

Two bases for jurisdiction are alleged by petitioners in their respective complaints (R. 1, 129); first, diversity of citizenship and the jurisdictional amount, Judicial Code, § 24(1), and second, the existence of a federal question, the consent of the State of Utah to be sued in the federal courts and the jurisdictional amount, Judicial Code § 24(1).

Petitioners charged respondents with interfering with the exercise of the federal war power, and with depriving petitioners of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. More specifically, it is charged that these seizures were a direct levy upon the means employed by the National Government to successfully wage a war, were an unlawful diversion to the general purposes of the State of a part of the subsidies paid by the National Government, a diversion from the stated purpose of their payment, without the consent of the National Government. The Congress of the United States had conferred no right upon the states to tax those special allowances, or in any manner or at all to dissipate them or make them a source of revenue to the State, and it is charged that that power is not possessed by either respondents or the State. And it was further charged that the subsidy payments were not "the

amount of money or its equivalent actually received *** from the sale" of ore or metals, it being here stipulated that "Metals Reserve Company does not purchase the ore on account of the production of which it pays premiums to the producers." (Par. 18, Stipulation of Facts, R. 75.) And it was charged that these exactions were without authority from the State of Utah, were in excess of respondents' powers, or the powers of any of them, and were an usurpation of power. (R. 9, 10, 136, 137.) Judgments were entered by the District Court against all the respondents as prayed. (R. 29, 152.) The Circuit Court of Appeals reversed and remanded with directions to dismiss on the grounds that the suits were against the State solely and that the State had consented to be sued only in the State courts. Judge Phillips dissented, finding a comprehensive waiver of sovereign immunity, a waiver that included authority to sue the State in the Federal district court.

The serious consequence of the misconstruction by the Court below cannot be gainsaid. In the instant case petitioners, whose case was deemed meritorious in the District Court, are denied access to a Federal tribunal, and will, in all probability, be met in the State courts by the contention that their actions are barred by the six months' statute of limitations of the State of Utah. State v. District Court of Salt Lake County, 102 Utah 284, 115 P. (2d) 913.

REASONS FOR GRANTING THE WRITS

1. The Circuit Court of Appeals, Tenth Circuit, has decided an important question of general law in a way untenable and in conflict with not merely the weight of authority but with all authority upon the subject. We submit that

the State of Utah has consented to be sued in the Federal courts.

Section 80-11-11, Utah Code Ann. 1943, was first enacted April 5, 1896, in substantially its present form (Laws of Utah 1896, Ch. CXXIX, Sec. 180, p. 466[1]), and has been in effect at all times since. This section as enacted and reenacted appears without alteration in—

R. S. of Utah 1898, Sec. 2684.
Comp. Laws of Utah 1907, Sec. 2684.
Comp. Laws of Utah 1917, Sec. 6094.

In 1933 the section was reenacted with the addition of the words "state *** or other taxing unit" to read as follows:

> 80-11-11. In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state,

[1] *** Sec. 180. That in all cases of levy of taxes, licenses or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such property may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid or against the county or municipality on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

> county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest. (Sec. 80-11-11, Rev. Stat. of Utah 1933.)

As such the section will be found in Utah Code Ann. 1943 as Sec. 80-11-11. With the single amendment in 1933, supra, Sec. 80-11-11, Utah Code Ann. 1943, is as enacted by the first legislature of the State of Utah in its first year of statehood.

R. S. Sec. 2326, Act of Congress of May 10, 1872 (30 U. S. C. A. Sec. 30)[2], had been a rule of thumb throughout the mining states of Colorado, Utah, Nevada, California and others west of the Rocky Mountains, the principal occupation of which was mining. In Sec. 80-11-11 as enacted April 5, 1896, the Utah legislature substituted the word "any" for "a", making the phrase read "any court of competent jurisdiction." As then carried into the Utah statutes the phrase had a uniformly accepted meaning in the State of Utah and elsewhere to include Federal as well as State courts.[3] That

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[2] *** It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; ***

[3] Blackburn v. Portland Gold Mining Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. Ed. 276, at 280.

Shoshone Mining Co. v. Rutter, 177 U. S. 505, 506; 20 S. Ct. 726, 44 L. ed. 864.

Chambers & Others v. Harrington & Another. Appeal from the Supreme Court of the Territory of Utah.—Decided April 14th, 1884. 4 S. Ct. 428, 28 L. ed. 452, 111 U. S. 350.

Perego v. Dodge, 163 U. S. 160, 16 S. Ct. 971, 41 L. ed. 113. (Appeal from a judgment of the Supreme Court of the Territory of Utah, decided May 18, 1896.)

Burke v. M'Donald, 2 Idaho (Hasb.) 339, 13 P. 351.

such had continued to be its accepted meaning is apparent by frequent recourse to the Federal courts for relief under its terms without question by the taxing authorities or by this Court or by the Circuit Courts of Appeal for the Eighth and Tenth Circuits.[4]

Since the question of Federal court jurisdiction under Section 80-11-11 cannot be determined in State court suits, conflicts will not arise with a State court decision on this issue. It is submitted, however, that the instant case is contrary to the interpretation accepted and approved by this Court and the Eighth and Tenth Circuits in all cases instituted in the Federal courts under Section 80-11-11. While it is apparent that a suit against a county does not require waiver of sovereign immunity[5], still a suit under Section 80-11-11 in a Federal court as one of the courts of competent jurisdiction cannot be authorized for some taxing units and

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[4] Basset v. Utah Copper Co., 219 F. 811, decided Nov. 14, 1914.
South Utah Mines & Smelters v. Beaver County, 262 U. S. 325, 43 S. Ct. 577, 67 L. ed. 1004, decided May 21, 1923.

Salt Lake County v. Utah Copper Co., 294 F. 199, decided Nov. 12, 1923; certiorari denied 264 U. S. 590, 44 S. Ct. 403, 68 L. ed. 864; error dismissed 267 U. S. 610, 45 S. Ct. 461, 69 L. ed. 813.

Beaver County v. South Utah Mines & Smelters, 17 F. (2d) 577, decided Jan. 4, 1927; certiorari denied 274 U. S. 746, 47 S. Ct. 659, 71 L. ed. 1328.

Salt Lake County v. Utah Copper Co., 93 F. (2d) 127, decided Nov. 22, 1937, certiorari denied 303 U. S. 652, 58 S. Ct. 750, 82 L. ed. 1112.

[5] These suits were instituted against the counties to whom the tax collecting function had been delegated. The State, however, shared in the proceeds, and its Attorney General or his deputies participated in the Federal litigation.

not for others, for there is but one phrase and the Federal courts must be deemed included for all officers and units that may be sued under the section. If the language means "any *State* court of competent jurisdiction," it is equally applicable to suits against counties. If the language means "*any* court of competent jurisdiction," it is equally applicable to suits against the State.

April 14, 1884, the phrase "a court of competent jurisdiction" was construed by this Court in a jurisdictional controversy arising out of the Territory of Utah as undoubtedly to mean "a court of general jurisdiction, whether it be a State court or a Federal court." Chambers & Others v. Harrington & Another, 111 U. S. 350, 4 St. Ct. 428, 28 L. ed. 452. By the 1933 amendment the State as such was brought within the provisions of Section 80-11-11, and the statute, then for the period of thirty-seven years, had been uniformly interpreted to embrace the Federal courts within the language "any court of competent jurisdiction," language that neither expresses nor implies a limitation of the State's consent to be sued, to a suit in the State courts only. (Finn v. Meighan, ... U. S. ....., 89 L. ed. Vol. 15, Adv. Op. p. 1086) And there is no contextual expression from which such a limitation could be implied. In the clear light of this settled, administrative and judicial practice and construction, the legislature in 1933 added the State itself to the coverage of Section 80-11-11 without any effort to limit the then existing accepted construction of the section as embracing Federal court suits.

Furthermore, when Section 80-5-76 was enacted in 1937, making Section 80-11-11 applicable to suits for refund of occupation taxes paid under protest, the State's purpose to

authorize Federal court action was again reiterated. The phrase as it appears in Section 80-5-76 occurs in the following context:

> 80-5-76. No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; provided, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11, Revised Statutes of Utah, 1933.

After providing that, of the State courts, the Supreme Court alone should have jurisdiction to review any decision of the State Tax Commission, the statute deliberately states the exception in the words "*provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11, Revised Statutes of Utah, 1933." The majority of the Court below flagrantly misconstrued Section 80-5-76 as showing a policy of review of tax commission decisions only in the Supreme Court of the State. The section specifically excludes the occupation tax where payment has been made under protest. A suit under Section 80-11-11 would not lie in the Supreme Court. The very purpose of the exception was to enable a taxpayer who had paid his tax under protest, to institute suit in a Federal court for recovery of the sum paid. The exception would not have been stated merely to authorize suit in the State's inferior courts, having already provided for complete review in the State's Supreme Court.

Moreover, the phrase "any court of competent jurisdiction," where not limited by the context, has been held without

exception to include both Federal and State courts indiscriminately, the facts otherwise essential to Federal jurisdiction being present.[6]

With this background we submit that it must be clear that "any court of competent jurisdiction" is used in the Utah statute in its ordinary and usual significance as generally understood, i. e., the one settled and uniformly recognized meaning of "each one of all" and to include State and Federal courts indiscriminately where the facts otherwise requisite

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[6] Under Sec. 77, sub. j, of the Bankruptcy Act, 11 U. S. C. A. Sec. 205, sub. j:

In re Chicago & E. I. Ry. Co. Gourley v. Wham CCA 7th, 121 F. 2d 785.

Under the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix Sec. 901, et seq:

Regan v. Kroger Grocery & Baking Co. (Brown, Administrator of Office of Price Administration, Intervener), 386 Ill. 284, 54 N. E. 2d 210.

Miller v. Municipal Court of City of Los Angeles, et al., 22 Cal. 2d 818, 142 P. 2d 297,

Hall v. Chaltis (Dist. of Col.), 31 A. 2d 699.

Under the Internal Revenue Act of July 13, 1866, Sec. 19:

The Collector v. Hubbard, 79 U. S. (12 Wall.) 1, 14; 20 L. ed. 272.

Under the Fair Labor Standards Act (29 U. S. C. A. Sec. 201 et seq.):

Stringer v. Griffin Grocery Co., 149 S. W. 2d 158,

Booth v. Montgomery Ward & Co., Inc., 44 F. Supp. 451,

Dennis v. Equitable Equipment Co. (La.) 7 So. 2d 397,

Donahue v. Susquehanna Collieries Co., CCA 3, 138 F. 2d 3,

Hargrave v. Mid-Continent Petroleum Corp., 36 F. Supp. 233,

Wingate v. General Auto Parts Co., 40 F. Supp. 364.

to Federal jurisdiction are present. Such was its meaning in 1933 when Section 80-11-11 was amended to expressly include the State of Utah in its waiver of immunity to suit "in any court of competent jurisdiction."

2. The Circuit Court of Appeals, Tenth Circuit, has decided an important question of Federal law, which has not, but should be settled by this Court. The decision below has misinterpreted and misapplied two recent decisions of this Court and it is therefore essential that the law be further clarified. The majority opinion was grounded on Great Northern Insurance Co. v. Read, 322 U. S. 47, and Ford Motor Co. v. Dept. of Treasury, 323 U. S. 459. Judge Phillips in his dissent pointed out that these cases were clearly distinguishable from the instant case. The sweeping application

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Generally:

National Sash & Door Co., Inc., v. Continental Casualty Co., CCA 5th, 37 F. 2d 342,

James Freeman Brown Co. vs. Harris, (CCA 4th) 139 F. 105,

Robertson v. Railroad Labor Board, 268 U. S. 619, 45 S. Ct. 621, 69 L. ed. 1119.

The word "any" is equivalent to, and has the force of every or each one of all:

Hopkins v. Sanders, 172 Mich. 227, 137 N. W. 709, 713,

Roedler v. Vandalia Bus Lines, Inc., 281 Ill. App. 520, 523,

Heyler v. City of Watertown, 16 S. D. 25, 91 N. W. 334,

People v. Van Cleave, 187 Ill. 125, 58 N. E. 422, 425,

Bouvier's Law Dictionary, Unabridged, Rawle's 3d Rev., Vol. 1, p. 205.

The word "any" is all comprehensive and unless limited by the context, includes all persons and things referred to indiscriminately:

Orme v. Atlas Gas & Oil Co., ... Minn. ....., 13 N. W. 2d 757, 763,

Stout v. Simpson, 34 Okla. 129, 124 P. 754, 756.

given these cases by the majority below would require nothing short of express mention in the statute of a Federal court as being within the ambit of the consent to be sued. That is not the rule stemming from the facts developed in the Great Northern Insurance Co. and Ford Motor Co. cases. Nor can that rule be deduced from the language in the Great Northern Insurance Co. case that Federal courts should not "be astute to read the consent to embrace Federal as well as State courts." A clear intent to submit to suit in the Federal courts can be found from the history of these Utah enactments and the language used therein. See point 1, supra.

It should be apparent that the two decisions of this Court at the past two terms do not require a flat expression of consent to suit in a Federal court. It has long been clear that no such flat expression is required for a waiver of the immunity of the United States to suit in State courts. Mr. Justice Brandeis, in Minnesota v. United States, 305 U. S. 382, 389-90, stated: "The United States argues that a statute granting permission to sue the United States must be construed to apply only to the Federal courts unless there is an explicit reference to the state tribunals . . . This is not universally true even as to suits against the United States . . .", citing United States v. Jones, 109 U. S. 513.

As Judge Phillips pointed out in his dissent, the Great Northern Insurance Co. case involved an Oklahoma statute giving precedence to suits brought under its provisions and directing the form of judgment to be entered. A Federal court could not be obligated to give the case precedence and this Court pointed out that "the kind of judgment to be returned . . . is quite different in language, if not in effect,

from the judgment a Federal court would render." The Court rested on the limitations, implicit and expressed, in Oklahoma statute.

Directing further attention to the Oklahoma statutes there involved, Session Laws 1915, Ch. 107, Art. 1, Subdivision B, it will be found that Section 1 provides that appeals taken from all boards of equalization "shall have precedence in the court to which they are taken." Section 2 provides a proceeding before the county board of equalization upon a complaint in writing and evidence adduced upon issues so framed:

> *** And the stenographer of the County Court is directed, at the request of the Board or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the action of the Board thereon and file the same with his certificate as to his accuracy in the district court, the filing of which transcript shall complete said appeal which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand. ***

Section 3 prescribes a similar proceeding before the State Board of Equalization. Section 4 provides that the appellate court "shall presume in favor of said Board any facts, circumstances or information of general knowledge in the particular business whose property was assessed by it"; Section 5 that "the remedies of resort to the Boards and appeal therefrom shall be the sole remedies for the correction of assessment or equalization." Such prescribed and exclusive procedures cannot be reconciled with the conduct of a suit in a Federal court. An express consent by the State to be sued in either the State or Federal courts is not to be found

in the Oklahoma statutes. The statutes of that State and the course of judicial decision thereunder manifest an intention to preserve the State's immunity from suit and, where waived, to limit consent to the courts of that State only.

Judge Phillips also pointed out in his dissent that the Ford Motor Co. case, decided by this Court last term, involved a statute providing in Section 64-2614(a):

> "Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; *and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected* . . ." (Italics supplied.)

The concluding language of the Indiana statute (which is wholly different from the Utah enactment here involved) was deemed highly persuasive by this Court. The Court specifically pointed out that,

> "The provision in this section which vests original jurisdiction of suits for refund in the 'circuit or superior court of the county in which the taxpayer resides or is located' indicates that the state legislature contemplated suit in the state courts. Moreover, this interpretation of § 64-2614(a) to authorize suits only in state courts accords with the state legislative policy. Indiana has adopted a liberal policy towards general contract claimants but confines their suits against the state to state courts." (323 U. S. at 465-6.)

Judge Phillips in his dissent in the present case likewise stressed the latter consideration of Indiana policy to permit suit against it on all claims but only in the superior court of a particular county.

The Utah situation is not comparable to that prevailing under the Indiana and Oklahoma statutes. The Utah public policy is and has been an extremely liberal one in permitting suit in State and Federal courts. Thus in 1939 the State consented to be sued "in any court of this state or of the United States" for recovery of real or personal property or in other actions pertaining to mortgage and lien foreclosure and other property disputes.[7]

Futhermore, it is apparent from the previous discussion that Section 80-11-11 had received a uniform construction of authorizing Federal court action.

Utah's consent to be sued is express and is phrased in comprehensive language that had been judicially construed by this Court before the enactment of Section 80-11-11 in 1896, to embrace the Federal courts in jurisdictional controversies arising in the Territory of Utah, language that has been similarly construed in a great number of applications throughout the United States without dissent over more than half a century.

The question of the propriety of the interpretation placed upon the Great Northern Insurance Co. and Ford Motor

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[7] Sec. 104-3-27 of the Utah Code Ann. 1943, reads in part:

"*** the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereof, or secure an adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved. *** "

Co. cases presents an important matter meriting review by this Court.

3. The Court below has decided an important question of local law as to the suability of individuals for unlawful conduct, in conflict with Utah law.

The Court below held that though the State Tax Commission was not the only party defendant but had as co-defendants the individual members, charged with unlawful and unauthorized exaction of funds, the suit was nevertheless exclusively against the State. It therefore found it necessary to consider whether the sovereign had consented to be sued in the Federal court and ordered the action dismissed upon concluding it had not. The line of reasoning followed to reach this result was that the impact of the judgment is felt by the State and that therefore it is the real party in interest. Support for this conclusion was thought to be found in Section 80-11-13 of the Code providing for segregation of funds paid under protest. (App. II.) Since, the Court reasoned, if the State were properly subjected to suit, it would be required to pay a judgment against it, it was concluded that the State alone was the real party in interest. The Court below went on to find that in the present proceedings the State was not subject to having a judgment entered against it. It is indeed ironical then to conclude that the suit against the individual commissioners was a suit against the State because the State would be obliged to pay the judgment.[8]

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[8] But "pending determination as to whom the money belongs, the State has no more claim to or control over the money than the taxpayer." Concurring opinion of Justice Larsen, State v. District Court of Salt Lake County, et al., 102 Utah 284, at 289, 115 P. 2d 913, at 916.

The net effect and meaning of the decision below is that the suit against the individual commissioners cannot be distinguished from that against the State Tax Commission. This is wholly contrary to Utah law. In State, by State Road Commission, et al., v. District Court, Fourth Judicial District, 94 Utah 384, 78 P. (2d) 502 (1938), the Supreme Court of Utah held that a suit insofar as it was brought against the Road Commission, an agency of the State, was against the State itself and that the State had not given its consent. It then considered the possibility of obtaining relief against the *individual members* of the Road Commission, though recognizing (94 Utah at 390, 78 P. (2d) at 505) that the effect of relief against the individuals "will be to coerce the State into paying . . . damages, or permanently prevent the State from carrying out the proposed highway improvement." The court posed the question (94 Utah at 392, 78 P. (2d) at 506): "Can the members of the Road Commission, if sued as individuals, avoid the injunction by asserting that they are acting as an agency of the State and the State cannot be sued?" It concluded that the suit against the individual members was an entirely different matter. "It must not be said that any officer of he State is not amenable to the process of the courts for violation of the law. The immunity of the State from suit cannot be successfully invoked by any official, high or low, to prevent the courts from enjoining an act forbidden by law." (94 Utah at 405, 78 P. (2d) at 511.)

The State Tax Commission is a creature of the Constitution. It is endowed with the power to sue and be sued in its own name, without qualification or limitation. (Section 80-5-46, Utah Code Annotated 1943). Suits against the State Tax Commission, in the absence of some impelling reason as here,

to sue the individuals comprising it, are properly and customarily instituted against the State Tax Commission in its own name solely.

It may be conceded that under appropriate circumstances when a single state officer, for example, the State Treasurer, is sued, and the State is obligated by statute to pay the judgment, the suit is exclusively against the State. That was the purport of Great Northern Life Insurance Co. v. Read, Insurance Commissioner for the State of Oklahoma, 322 U. S. 47. But in the instant case the judgment sought against the Commission and that sought against the individuals comprising it had different foundations in Utah law. Though the State Tax Commission were deemed the State, the relief sought against it can nevertheless be pressed on the grounds that the suit arises under the Constitution and laws of the United States and Utah has consented to be sued in the Federal court. Either the Commission or the State must be sued to bring into operation Section 80-11-13 and the obligation of the State to pay the judgment. But there is no reason why the individual members may not also be sued in the Federal court, both because of the Federal questions and on diversity of citizenship.

Suits maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs under color of authority that in fact had not been conferred, are not suits against the State.[9] And not only will it be assumed, for the purpose of

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[9] Worcester County Trust Co. v. Riley, 302 U. S. 292, 82 L. ed. 268, 274.

Greene v. Louisville & I. R. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. ed. 1280, 1285.

these petitions, that the individual members of the State Tax Commission were acting without authority, but that assumption is fortified by the judgments rendered in eleven suits instituted in the State District Court under the same statutes and for the same relief as here, wherein the State court found that the effort of these respondents, manifest in the instant suits, was without authority. (App. III-VI)

The intention of the complaint to seek judgments against the defendants in their individual capacities is manifest not only in the fact that in part jurisdiction was founded on diversity of citizenship—as to the State, diversity not affording a basis for District Court jurisdiction—but also in the allegations of the complaint that "said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants or any of them, * * * (R. 10, 137).

The buttressing argument of the Court below, that it would have been unnecessary for petitioners in their complaint to have pointed out that the funds paid in had been segregated under Section 80-11-13 if it did not contemplate

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Atchison, Topeka & Santa Fe Ry. Co., Plff. in Error, v. Timothy O'Connor, 223 U. S. 280, 56 L. ed. 436.

Hopkins v. Clemson Agricultural College, 221 U. S. 636, 55 L. ed. 890.

Ex Parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. ed. 714.

Thomas Poindexter, Plff. in Err., v. Samuel C. Greenhow, Treas. of the City of Richmond, Va., 114 U. S. 270, 29 L. ed. 185.

State Board of Escheats of Michigan v. Klump, et al., 38 F. 2d 625.

State Life Ins. Co. v. Daniel, et al., 6 F. Supp. 1015.

suing the State as such, is entitled to no weight in the light of what has been said. Petitioners sued the State Tax Commission and had cause for belief that that portion of the suit might be deemed a suit against the State. It had every reason to believe under the established Utah law (State Road Commission v. District Court, supra) that the suit against the individual members was not subject to that interpretation.[10] The complaint was drawn to comply with all the requirements for suit against all the parties. The District Court in fact entered judgments against the individual defendants as such and the State was under no obligation to pay them if execution had been sought against the individuals.

The effect of the decision below is to remove individual liability for unlawful exactions of taxes contrary to all Utah law.

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[10] Section 80-11-11 authorizes suit only against the collecting officer or the State. The collecting officer was the State Tax Commission and not the individual commissioners. The suit against the latter has a non-statutory basis. There is no authority in Section 80-11-13 for payment from segregated funds of judgments obtained against individuals in non-statutory suits.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be granted.

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APPENDIX

Utah Code Annotated 1943:

80-5-66.

• • • every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold which tax shall be in addition to all other taxes provided by law. • • •

The basis for computing the occupation tax imposed by this act for any year shall be as follows:

(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year • • •

80-5-81.

All occupation taxes imposed and collected under this act shall be paid to the state tax commission, and by it promptly paid over to the state treasurer, and by him credited to the state general fund.

80-5-76.

No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933.

80-11-11.

In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

80-11-13.

In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized.

Opinion of the Honorable M. J. Bronson, Judge Third Judicial District Court of the State of Utah, in and for Salt Lake County, in the suits pending in that court referred to in the opinion.

M. J. BRONSON
Judge
Third Judicial District Court
Salt Lake City, Utah

May 2, 1945.

Mr. Herbert Van Dam,
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Walker Bank Building,

Cheney-Jensen-Marr & Wilkins,
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Continental Bank Building,

Farnsworth & Van Cott,
Attorneys-at-Law,
Walker Bank Building,

Mr. Grover A. Giles,
Attorney General,
State Capitol Building,
Salt Lake City, Utah.

Gentlemen:

I am of the opinion that the premiums or bonus paid by Metals Reserve Company cannot, under the statutes of the State of Utah involved, be considered a part of the "gross proceeds" of bona fide sales of the metal products of plaintiff mining companies, but that such payments constitute an inducement to increase production, adding nothing to the intrinsic value of the metal that would in any way affect its sale price on a free and open market to any independent and unhampered purchaser. The State Tax Commission of Utah, in the opinion of this court, had

no authority to levy or collect an occupational tax from the plaintiff mining companies, including in the base used for such purposes, the subsidy payments paid to the plaintiff corporations by the United States Government.

I have, therefore, caused to be entered this day a minute entry of judgment in the following cases as herein set out:

Tintic Standard Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73917. In favor of plaintiff and against the defendants for the sum of $4,404.94 plus the sum of $60.20, together with interest on both said sums at the rate of 6% per annum from August 22, 1944, until paid, and for plaintiff's costs of suit.

Eureka Lilly Consolidated Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73916. In favor of plaintiff and against the defendants for the sum of $107.92 plus the sum of $1.47, together with interest on both said sums at the rate of 6% per annum from August 22, 1944, until paid, and for plaintiff's costs of suit.

Montana Bingham Consolidated Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73924. In favor of plaintiff and against the defendants for the sum of $329.59 plus the sum of $4.55, together with interest on both said sums at the rate of 6% per annum from August 24, 1944, until paid, and for plaintiff's costs of suit.

Chief Consolidated Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73923. In favor of plaintiff and against the defendants for the sum of $4,922.39 plus $69.73, together with interest on both said sums at the rate of 6% per annum from August 24, 1944, until paid, and for plaintiff's costs of suit.

Colorado Consolidated Mines Company, Plaintiff, v. State Tax Commission, et al, No. 73918. In favor of plaintiff and against the defendants for the sum of $137.58 plus $1.88, together with interest on both

said sums at the rate of 6% per annum from August 22, 1944, until paid, and for plaintiff's costs of suit.

Eureka Bullion Mining Company, Plaintiff, v. State Tax Commission, et al, No. 74001. In favor of plaintiff and against the defendants for the sum of $72.43, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

U. S. Smelting, Refining and Mining Company, Plaintiff, v. State Tax Commission, et al, No. 73925. In favor of plaintiff and against the defendants for the sum of $1,235.68 plus $17.06, together with interest on both said sums at the rate of 6% per annum from August 24, 1944, until paid, and for plaintiff's costs of suit.

International Smelting and Refining Company, Plaintiff, v. State Tax Commission, et al, No. 74002. In favor of plaintiff and against the defendants for the sum of $262.50, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

National Tunnel and Mines Company, Plaintiff, v. State Tax Commission, et al, No. 74003. In favor of plaintiff and against the defendants for the sum of $8,991.90, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

Ohio Copper Company of Utah, Plaintiff, v. State Tax Commission, et al, No. 74004. In favor of plaintiff and against the defendants for the sum of $1,448.66, together with interest on said sum at the rate of 6% per annum from August 23, 1944, until paid, and for plaintiff's costs of suit.

Combined Metals Reduction Company, Plaintiff, v. State Tax Commission, et al, No. 73850. In favor of plaintiff and against the defendants for the sum of $5,103.61 plus $53.70, together with interest on both said sums at the rate of 6% per annum from

August 2, 1944, until paid, and for plaintiff's costs of suit.

Findings of fact and conclusions of law having been waived by counsel upon stipulation entered in all the foregoing cases it is requested that counsel for plaintiffs in all of said cases prepare judgments in accordance herewith for signature by the court.

Very truly yours,

(Sgd) M. J. BRONSON
District Judge